Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
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No. 89-5383

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARK HOWLETT, a minor by and through ELIZABETH HOWLETT, his mother, natural guardian and friend, Petitioners,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983 ABROGATES STATE SOVEREIGN IMMUNITY IN SUITS BROUGHT AGAINST A STATE OR ONE OF ITS AGENCIES IN ITS OWN STATE COURTS.

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Felder v. Casey, 487 U.S.__, 108 S.Ct. ___, 101 L.Ed.2d 123 (1988)

Gumbhir v. Kansas State Board of Pharmacy, 231 Kan. 507, 646 P.2d 1078 ( )

Hill v. Dept. of Corrections, 513 So.2d 129 (Fla. 1989) cert. denied __ U.S.__, 108 S.Ct 1024, 98 L.Ed.2d 989 (1988)

Howlett by Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989)

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Martinez v. State of California, 444 U.S 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980)

Moss v. Robertson, 712 S.W.2d 351 (Ky.App.1986)

Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274 97 S.Ct. 568, 50 L.Ed.2d 471

Quern v. Jordan, 440 U.S 332, 99 S.Ct. 1347, 39 L.Ed.2d 662 (1984)

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42 U.S.C. §1983

Rule 17.1(c), Supreme Court Rules

§768.28, Fla. Stat.

MARK HOWLETT, a minor by and through ELIZABETH HOWLETT, his mother, natural guardian and friend, Petitioners,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Respondents.

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the District Court of Appeal for Florida, Second District, opinion in this case. That opinion is reported at 537 So.2d 706 (1989).

REASONS WHY THE PETITION SHOULD BE DENIED

I. **The district court decision does not conflict with prior decision of this Court.**

Petitioner has failed to show that the District Court of Appeal for the Second District of Florida, (hereinafter Second DCA), decision in Howlett by Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), is in conflict with applicable decisions of this Court so as to give rise to this Court's jurisdiction pursuant to Rule 17 of the Supreme Court Rules. Rule 17.1(c) states:

> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner relies on two of this Court's decisions to support the request for discretionary review.

Petitioner claims that the opinion rendered by the DCA in Howlett by Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), is in conflict with the decision rendered in Felder v. Casey, 487 U.S. __, 108 S.Ct. __, 101 L.Ed.2d 123 (1988), and Martinez v. State of California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). Such reliance is misplaced. Careful reading of these two cases in accordance with the decision in Howlett reveals no such conflict.

Martinez, supra, involved a claim against the State of California for damages arising after the murder of a 15-year old girl by a parolee, a known repeat sex offender. The action was brought under state statutes and 42 U.S.C. §1983 in the state court system. The state claimed immunity pursuant to a state statute which provided absolute immunity to state officials and employees for injuries which resulted from a decision to release or parole a prisoner. This Court did not, however, address the immunity question but rather ruled that no right guaranteed by the United States Constitution or a law of the United States was violated, dispensing with the need to reach the immunity issue. This Court stated:

> It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts. We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in Baker v. McCollan, 443 U.S 137, 99 S.Ct. 2689, 61 L.Ed.2d 433, "[t]he first inquiry in any §1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the

> Constitution and laws' of the United States. The answer to that inquiry disposes of this case.

Martinez, supra, at 284 (footnote omitted).

Petitioner further indicates that Martinez, supra, (which does not conflict with Howlett) should be read in connection, and together, with Felder v. Casey, 487 U.S. __, 108 S.Ct.__, 101 L.Ed.2d 123 (1988). Felder, supra, involved a 42 U.S.C. §1983 claim against the City of Milwaukee, Wisconsin and several police officers after an injury allegedly inflicted on a black individual by white police officers. This case involved a Wisconsin notice of claim statute in regards to §1983 claims. This Court, while thoroughly addressing the notice provisions and the intent of Congress in enacting §1983 legislation, did not squarely address the issue of sovereign immunity. Thus, no conflict arises which would invoke jurisdiction over the Howlett decision in the Florida courts.

In Howlett, supra, the DCA relied on Hill v. Dept. of Corrections, 513 So.2d 129 (Fla. 1987), a well reasoned opinion by the Florida Supreme Court. Hill addressed the applicability of the Eleventh Amendment immunity, state common law immunity, and §768.28, Fla. Stat. (1988) in causes of action brought under 42 U.S.C. §1983.

The Florida Supreme Court first considered the effect of the Eleventh Amendment on suits filed under 42 U.S.C. §1983. The court relied on Quern v. Jordan, 440 U.S 332, 99 S.Ct. 1347, 39 L.Ed.2d 662 (1984), for the proposition that §1983 is not a

"congressional abrogation of a state's eleventh amendment immunity." Hill, supra, at 131. The eleventh amendment applies to actions brought in federal courts. This Court in Quern, supra stated that Congress did not intend §1983 to override traditional sovereign immunity.

The court in Hill analyzed the distinction between Eleventh Amendment immunity and sovereign immunity and stated:

> In Ramah Navajo School Board v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App.) cert. denied, __ U.S. __, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986), the court addressed the question by first explaining:
>
> "Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect the same object - state government. Civil Action Against State Government: Its Divisions, Agencies and Officers (Winborne, ed. 1982). The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects state governments from intrusions from the federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. Id. Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendant is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereign immunity bars the suit. Gumbhir v. Kansas State Board of Pharmacy [231 Kan. 507, 646 P.2d 1078]."
>
> 104 N.M. at 307, 720 P.2d at 1248. The court then reasoned that since Congress in enacting section 1983 did not intend to destroy the state's eleventh amendment immunity from suit brought in federal court, it logically followed that Congress also did not intend to abrogate the state's sovereign immunity from section 1983 suits brought in state courts.

Hill, supra, at 131.

The Court did indicate that just as in a case which involves eleventh amendment immunity, the courts must determine if there has been a waiver of sovereign immunity. The question of waiver is not an issue raised by petitioner.

II. Eleventh Amendment Immunity

Petitioner makes reference to the immunity issue as it relates to the School Board of Pinellas County and cites Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Mt. Healthy applies only to eleventh amendment immunity issues and addresses the question of whether the school district is an arm of the state by analyzing the powers and duties of the school district. Petitioner attempts to utilize this same rationale to determine the applicability to the instant case. In Howlett, however, eleventh amendment immunity has not been addressed and does not apply. Petitioner's analysis of Mt. Healthy here is inappropriate.

III. Conflicting state court decisions distinguishable.

Petitioner cites a number of state court decisions to support the proposition that state courts have contradicted existing U.S. Supreme Court decisions. These cases are distinguishable from the instant case. Moss v. Robertson, 712

S.W.2d 351 (Ky.App.1986) involved a §1983 suit against an individual in his individual capacity. The Kentuckey court did not address the sovereign immunity issue and dismissed the suit against the individual for lack of governmental action. Moss, supra, does not contradict either Martinez, supra, or Felder, supra.

Further, petitioner cites Jeffers v. Ray County, 750 S.W.2d 599 (Mo.App. 1988), which also was a §1983 claim. That court did not address an immunity situation, but whether or not the factual allegations were sufficient to support a §1983 claim. The court stated that a plaintiff cannot take a common negligence action and turn it into a §1983 claim. No conflict with Martinez, supra, or Felder, supra, exists. The remaining cases also cited do not involve sovereign immunity as does Howlett and do not constitute conflicts with the existing decisions of this Court, and thus, cannot give rise to jurisdiction of this Court pursuant to Rule 17 of the Supreme Court Rules.

Conclusion

Petitioner has failed to show sufficient conflict with existing decisions of this Court to invoke jurisdiction for review pursuant to the provisions of Rule 17 of the Supreme Court Rules. Howlett, supra, the instant case is not in conflict with the decisions cited by petitioner. Howlett, supra, relied on Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987),

cert. denied, __ U.S. __, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). Neither of these Florida court decisions is in conflict with Martinez, supra, or Felder, supra.

Eleventh Amendment immunity is not applicable here and thus discussion of Mt. Healthy is not appropriate to this petition. Further, cases cited by petitioner alleging widespread incorrect decisions regarding sovereign immunity are completely distinguishable so do not conflict with existing decisions of this Court, and do not give rise to jurisdiction under Rule 17.

For the foregoing reasons, respondents respectfully request that the Court deny Petitioner's request for a writ of certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been forwarded to Gardner W. Beckett, Jr., Esq., Nelson, Beckett & Nelson, 123 Eighth Street North, St. Petersburg, FL 33701 this the 12 day of October, 1989.

Bruce P. Taylor

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clm

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APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 89-5383

Mark Howlett, etc. (Petitioner ~~or Appellant~~) vs. Scott Rose, etc., et al. (Respondent ~~or Appellee~~)

The Clerk will enter my appearance as Counsel of Record for Mark Howlett

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature [signature]

(Type or print) Name Gardner W. Beckett Jr.

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A